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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

KATHY KEETON,

*Petitioner,*

*vs.*

HUSTLER MAGAZINE, INC., LARRY C. FLYNT, LFP, INC. and L.F.P., INC.,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the First Circuit**

## PETITIONER'S REPLY BRIEF

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## TABLE OF CONTENTS


| | PAGE |
|---|---|
| TABLE OF AUTHORITIES | iii |
| SUMMARY OF ARGUMENT | 1 |
| I. Due process permits the assertion of jurisdiction in this case and does not require dismissal | 2 |
| A. Where the defendant engages in purposeful activity within the forum, there exist minimum contacts such that it would be fair and reasonable to assert specific jurisdiction over claims relating to that activity | 2 |
| B. Even if the forum's interest is to be considered a factor in this case, New Hampshire expressed such an interest | 7 |
| C. Respondents' balancing test would prematurely subject the jurisdictional inquiry to numerous amorphous factors, would be unworkable, and would destroy all elements of predictability | 9 |
| II. Proof of substantial reputational interest in the forum is not a prerequisite for jurisdiction over a libel action | 11 |
| III. Personal jurisdiction is measured only by the due process clause: other constitutional considerations are inapplicable to the minimum contacts test | 15 |
| A. The commerce clause does not limit the Court's power over the person of the defendant | 17 |

PAGE

B. First Amendment considerations do not inhibit the exercise of jurisdiction over the person of the defendant ..... 19

CONCLUSION ..... 20

PAGE

## *Table of Authorities*

### Cases Cited

Anselmi v. Denver Post, Inc., 552 F.2d 316 (10th Cir. 1977), *cert. denied sub nom.* Time Mirror Co. v. Anselmi, 432 U.S. 911 (1977) ..... 12, 19

B & O R.R. v. Kepner, 314 U.S. 44 (1941) ..... 17, 18

Buckley v. New York Post Corp., 373 F.2d 175 (2d Cir. 1967) ..... 12, 18-20

Christopher v. American News Co., 171 F.2d 275 (7th Cir. 1948) ..... 13

Collins v. American Auto Ins. Co., 230 F.2d 416 (2d Cir. 1956) ..... 16

Curtis Publishing Co. v. Golino, 383 F.2d 586 (5th Cir. 1967) ..... 7, 19

Davis v. Farmers Cooperative Co., 262 U.S. 312 (1923) ..... 17, 18

Edwards v. Associated Press, 512 F.2d 258 (5th Cir. 1975) ..... 19

Elkhart Engineering Corp. v. Dornier Werke, 343 F. 2d 861 (5th Cir. 1965) ..... 11

Estin v. Estin, 334 U.S. 541 (1948) ..... 10

Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) ..... 17

Hanson v. Denkla, 357 U.S. 235 (1958) ..... 5, 6

Haskell v. Bailey, 63 873 (4th Cir. 1894) ..... 12, 13

Headrick v. Atchinson, 182 F.2d 305 (10th Cir. 1950) ..... 16

Herbert v. Lando, 441 U.S. 153 (1979) ..... 19

Hess v. Pawlowski, 274 U.S. 352 (1927) ..... 11

PAGE

Hutchinson v. Proxmire, 443 U.S. 111 (1979) ..... 19

Insurance Corp. v. Compagnie des Bauxites, 456 U.S. 694 (1983) ..... 4, 15

International Shoe Co. v. Washington, 326 U.S. 310 (1945) ..... 2, 10

Keeton v. Hustler Magazine, Inc., 682 F.2d 33 (1st Cir. 1982) ..... 8, 14

Kloeckner Reederie und Kohlenhande v. AS/Hakedal, 210 F.2d 754 (2d Cir.), *cert. dism'd per stipulation*, 348 U.S. 801 (1954) ..... 16

Kulko v. Superior Court, 436 U.S. 84 (1978) .....3, 5, 6, 8-10

Leeper v. Leeper, 114 N.H. 294, 319 A.2d 626 (1974) 8

McGee v. International Life Ins. Co., 350 U.S. 220 (1957) ..... 8, 10

Miles v. Illinois Central R.R. Co., 315 U.S. 698 n.3 (1941) ..... 18

Moses H. Cone Hospital v. Mercury Construction Co., 51 U.S.L.W. 4156 (1983) ..... 16

New York Times Co. v. Connor, 365 F.2d 567 (5th Cir. 1966) ..... 7, 19

New York Times v. Sullivan, 376 U.S. 254 (1964) .... 19

Novel v. Garrison, 294 F. Supp. 825 (N.D. Ill. 1969) 11

PAGE

Pennoyer v. Neff, 95 U.S. 714 (1978) ..... 3

Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) .....15-17

Roy v. North American Newspaper Alliance, 106 N.H. 92, 205 A.2d 844 (1964) ..... 5, 7

Rosenblatt v. Baer, 383 U.S. 75 (1966) ..... 14

Rush v. Savchuk, 44 U.S. 320 (1980) .....4-6, 10

Scanapico v. Richmond F & P R.R., 439 F.2d 17 (2 Cir. 1970) ..... 17

Shaffer v. Heitner, 433 U.S. 186 (1977) .....3-6, 10

Southern Machine Co. v. Mohasco Indus., 401 F.2d 374 (6th Cir. 1968) ..... 18

Vanity Fair Mills v. T. Eaton Co., 234 F.2d 633 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956) ..... 16

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) .....3-6, 10

Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd., 50 T.L.R. 581 (C.A. 1934) ..... 14

**United States Constitution Cited**

First Amendment ..... 19

**Statutes Cited**

N.H. REV. STAT. ANN. §644:11(A) ..... 8

28 U.S.C. §1404 (a) (West 1976) .....16, 17

PAGE

**Other Authorities Cited**

L. ELDREDGE, THE LAW OF DEFAMATION (1978):

§4 at 9-10 ..... 14

§4 at 11 ..... 15

§97 at 564 ..... 12

10 MOORE'S FEDERAL PRACTICE, §2.01.02[1] (1982) ..... 17

Restatement (Second) of Conflict of Laws §150 (1971) ..... 13

Restatement (Second) of the Law of Torts § 558 (1977) ..... 12

TRIBE, AMERICAN CONSTITUTIONAL LAW (1st ed. 1978) ..... 14

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## PETITIONER'S REPLY BRIEF

## Summary of Argument

The minimum contacts inquiry imposed by the due process clause to determine the propriety of the exercise of in personam jurisdiction over a non-resident defendant involves two kinds of analysis. Due process is satisfied if a defendant has engaged in purposeful activity aimed at the forum which directly relates to the cause of action. If this requirement is satisfied, there exist minimum contacts such that it is fair and reasonable for the defendant to respond to a lawsuit in the forum. Under this formula, there is no need to consider or balance other factors.

Balancing only becomes necessary where there exist judicially cognizable ties between the defendant and the forum which, however, do not amount to purposeful activity directly related to the cause of action. In such a case, other factors may nevertheless tip the scales in favor of exercising jurisdiction. These factors have been described by this Court as the forum state's interest in ajudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental social policies.

Respondents' theory of jurisdiction completely eliminates the first analysis, and invokes a balancing test as the *only* test for due process. This approach asks the Court to weigh the burden on the defendant against a variety of other interests. It ignores the purposeful acts directed at a forum to invoke the benefits and protections of its laws, which has been the crux of the jurisdictional standard for almost forty years.

In every case, respondents would apply a complex balancing test which focuses on numerous subjective factors rather than the normative considerations arising from defendant's forum-related bahavior. In addition, respondents would throw into the balance first amendment and commerce clause factors, both of which may be treated

in the context of forum non conveniens, but should have no relevance to the issue of personal jurisdiction.

The argument that no cause of action for defamation arose in New Hampshire because Keeton suffered minimal damages in that forum misconstrues the unique nature of the tort of libel. The cause of action for libel arises in every jurisdiction where the offending material is circulated, and proving the extent of injury is inappropriate to the jurisdictional inquiry.

## I. Due process permits the assertion of jurisdiction in this case and does not require dismissal.

### A. Where the defendant engages in purposeful activity within the forum, there exist minimum contacts such that it would be fair and reasonable to assert specific jurisdiction over claims relating to that activity.

It is not genuinely disputed that respondent Hustler has certain "minimum contacts" with New Hampshire. What is really at issue is whether other considerations should compel New Hampshire to refuse to entertain Keeton's lawsuit.

Since 1977, this Court has refined the "minimum contacts" test of *International Shoe* by eschewing a quantitative analysis in favor of a qualitative inquiry, and by explaining the parameters of "fair play and substantial justice" in terms of the defendant's purposeful activity directed at the forum which relates to plaintiff's cause of action*. It is this purposeful activity on the part of Hustler—the continuous, deliberate exploitation of the New Hampshire market by a national publication aimed at a nation-wide audience—which makes it reasonable and fair

* Purposeful activity is sufficient to sustain specific jurisdiction over claims relating to that activity, whereas activity within the forum that is regular and permanent may be sufficient to sustain general jurisdiction which can embrace even unrelated claims.

to require Hustler to defend a libel suit in New Hampshire arising from the circulation of its magazines there.

Undermining whatever remained of *Pennoyer* v. *Neff*, 95 U.S. 714 (1978), this Court in *Shaffer* v. *Heitner*, 433 U.S. 186, 204 (1977), held that:

> the relationship among the defendant, the forum and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction.

The jurisdiction asserted in *Shaffer* violated due process because of the absence of defendants' contacts with Delaware and the lack of any relationship among the sequestered property, the cause of action and the forum. *Id.* at 213.

In *Kulko* v. *Superior Court*, 436 U.S. 84, 97-98 (1978), this Court held that the quality and nature of the defendant father's activities in California did not warrant the exercise of personal jurisdiction over him in the mother's action for child custody and increased support. Because the father in *Kulko* "derives no personal or commercial benefit from his child's presence in California and . . . lacks any other relevant contact with the State", *id.* at 100-01, it was unfair to permit the exercise of jurisdiction over him.

This Court also concluded that personal jurisdiction could not be constitutionally exercised in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), on the ground that defendants lack "affiliating circumstances" with the forum, "avail themselves of none of the privileges and benefits of Oklahoma law" and do not sell cars to Oklahoma customers or "indirectly, through others, serve or seek to serve the Oklahoma market." *Id.* at 295. As in *Kulko*, this Court described the asserted nexus with the forum as a "fortuitous circumstance," arising from an "isolated occurrence." *Id.*

The teaching of these cases is that where the quality and nature of a defendant's forum activities do rise to the level of purposeful conduct so that it is reasonable to require him to defend there, other factors (such as the interests of the forum state) need not be evaluated. However, "a variety of factors relating to the particular cause of action," *Rush* v. *Savchuk*, 444 U.S. 320, 332 (1980) may be relevant "in an appropriate case", *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. at 292, where the conduct is less than purposeful but the defendant has "judicially cognizable ties", *Rush* v. *Savchuk*, 444 U.S. at 332. It is submitted that once the essential criterion of purposeful activity is established, a forum's interest, or disinterest, cannot be used to deprive it of jurisdiction under the due process analysis.*

Each state's separate interest in the litigation is important in the choice of law calculus, but it is not determinative of the jurisdictional inquiry. Just as this Court has "rejected the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute," *Shaffer* v. *Heitner*, 433 U.S. at 215, the selection of the law of a state other than the forum to govern substantive aspects of a particular case does not deprive the forum of its adjudicative power.

The effort to infect the jurisdictional issue with choice of law analysis has been spurned by this Court: "[The State] does not acquire . . . jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the [appellants]." *Shaffer* v.

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* State statutes enacted by a forum have already struck the balance representing the forum's interest, *see Insurance Corp.* v. *Compagnie des Bauxites*, 456 U.S. 694, 712 n.3 (1983) (Powell, J. concurring), and therefore the forum's interest should not ordinarily be scrutinized once again as part of the jurisdictional inquiry.

*Heitner*, 433 U.S. at 215, quoting *Hanson* v. *Denkla*, 357 U.S. 235 (1958). It has also been observed that in considering jurisdiction, "we are concerned solely with 'minimum's contacts, not the 'best' contacts." *Shaffer* v. *Heitner*, 433 U.S. at 228 (Brennan, J., concurring in part and dissenting in part). *Accord, World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. at 301 (Brennan, J., dissenting) ("The defendant has no constitutional entitlement to the best forum or, for that matter, to any particular forum. Under even the most restrictive reading of International Shoe, several States could have jurisdiction over a particular cause of action.") Similarly, this Court noted in *Kulko*, "the fact that California may be the 'center of gravity' for choice-of-law purposes does not mean that California has personal jurisdiction over the defendant", 436 U.S. at 98.

In *Rush* v. *Savchuk*, 444 U.S. at 332, this Court rejected the plaintiff's arguments favoring jurisdiction because "[t]he State's interests in providing a forum for its residents and in regulating the activities of insurance companies are substituted for its contacts with the defendant and the cause of action." In certain circumstances, strong policies may favor enforcing a forum's interest to uphold its assertion of jurisdiction. But the caution against substituting a forum's interest for the contracts of the defendant applies all the more forcefully when a forum's purported disinterest is used to defeat jurisdiction that exists under the prevailing standard. This is particularly so in this case since the Supreme Court of New Hampshire has interpreted that State's long-arm statute to extend to the fullest reach that due process allows. *Roy* v. *North American Newspaper Alliance*, 106 N.H. 92, 205 A.2d 844 (1964).

This Court has already decided cases where the forum's interest need not be reached in deciding whether due process permits the exercise of jurisdiction. In *Rush*, this

Court stated: "[i]f a defendant has certain judicially cognizable ties with a State, a variety of factors relating to the particular cause of action may be relevant to the determination whether the exercise of jurisdiction would comport with 'traditional notions of fair play and substantial justice'" 444 U.S. at 332 (citations omitted). However, because the majority in *Rush* found that there was *no* contact with the forum, there was no need to consider other relevant factors.

The identical analysis was made in *World-Wide Volkswagen* v. *Woodson*, where the absence of any contacts made it unnecessary to consider other factors, ('even if the forum State has a strong interest in applying its law to the controversy . . ." 444 U.S. at 294.

No balancing of secondary factors was required in *Hanson, Shaffer, Kulko, Rush* and *World-Wide Volkswagen* because the defendants in these cases lacked forum contacts; likewise, no balancing is required here because of the nature and quality of the conduct directed at the forum. These two situations represent opposite ends of the spectrum of forum-related activity. At one end, where there are no contacts, jurisdiction cannot be asserted and consideration of other factors cannot create it. At the other end, where there is purposeful conduct related to the cause of action, other considerations cannot prevent the exercise of jurisdiction. It is only in cases which fall in the middle of this spectrum because of the existence of judicially cognizable ties, that a balancing of other factors is necessary to determine whether due process would be satisfied.

In this case, the district court found that respondents' contacts with New Hampshire "were not random, isolated or transitory", but instead were regular and permanent, amounting to a "general course of conduct . . . purpose-

fully directed at New Hampshire" (Pet. 5a).* The "quality and nature" of respondents' New Hampshire activities were such as to make it reasonable for them to expect to defend a libel suit in that forum. Given such findings of fact by the district court,** the minimum contacts test is satisfied and other factors need not be considered.

**B. Even if the forum's interest is a factor to be considered in this case, New Hampshire has expressed such an interest.**

Assuming *arguendo* that the forum's interest is a relevant criterion to weigh in assessing jurisdiction, petitioner has identified three separate interests asserted by New Hampshire. Respondents have failed to refute or even address these several interests, and have been unable to isolate any statement on the part of New Hampshire's legislature or its courts which expresses a preference against entertaining this case. To the contrary, New Hampshire has indicated that it will construe its long-arm statute to the fullest extent permitted by due process. *Roy* v. *North American Newspaper Alliance,* 106 N.H. 92, 205 A.2d 844 (1964).

The three reasons why petitioner believes New Hampshire has an interest in asserting jurisdiction are:

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* A distinction can be drawn between the purposeful activity of a national publication like Hustler, which deliberately and regularly seeks to capture a national readership, and a local publication with no intention of circulating its product within the forum. *Compare Curtis Publishing Co.* v. *Golino,* 383 F.2d 586, 590-91 (5th Cir. 1967), *with New York Times Co.* v. *Connor,* 365 F.2d 567, 570-71 (5th Cir. 1966).

** The district court went beyond a finding of purposeful contacts, implying that they were regular and permanent. Such a finding supports the exercise of general jurisdiction, although that is an issue this Court need not reach in this case.

(1) In 1971, the New Hampshire Legislature amended its long-arm statute (Pet. 20a) to delete the former requirement that a tort be committed "against a resident of New Hampshire."

(2) In 1974, New Hampshire's highest court announced its "especial interest in exercising judicial jurisdiction over those who commit torts within its territory." *Leeper* v. *Leeper*, 114 N.H. 294, 298, 319 A.2d 626 (1974). Indeed, the Court of Appeals acknowledged New Hampshire's "desire to deter wrongful conduct within its boundaries; a desire to protect its citizens from reading libels about outsiders; or a desire to prevent injuries to the reputations of outsiders from occurring within the state because those outsiders may someday be hurt if they turn up in New Hampshire or because there may be a spillover effect on their reputations elsewhere" *Keeton* v. *Hustler Magazine, Inc.*, 682 F.2d 33, 34 (1st Cir. 1982) (citations omitted).

(3) New Hampshire has an interest in deterring criminal conduct, and has particularized that interest with reference to this situation by enacting a criminal defamation statute which makes it is a misdemeanor when a person "purposely communicates to any person, orally or in writing, any information which he knows to be false and knows will tend to expose any other living person to public hatred, contempt or ridicule." N.H. Rev. Stat. Ann. §644:11 (A) (Pet. 21a).*

When combined with the purposeful nature of respondents' contacts with New Hampshire, these forum interests together and independently warrant the exercise of jurisdiction.

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* While this is not a jurisdictional statute, it nevertheless evidences a "particularized interest" on the part of New Hampshire to regulate intentional defamation. See *Kulko* v. *Superior Court*, 436 U.S. at 98; *McGee* v. *International Life Insurance Co.*, 350 U.S. 220, 224 (1957).

**C. Respondents' balancing test would prematurely subject the jurisdictional inquiry to numerous amorphous factors, would be unworkable and would destroy all elements of predictability.**

The formula advocated by respondents is concisely stated at page 5 of their brief under Summary of Argument: "[t]he Due Process minimum contacts standard for assertion of personal jurisdiction requires that the burden to the defendant be outweighed by the state's interest in litigating the dispute, the interstate judicial system's interest in efficient dispute resolution, and the plaintiff's interest in obtaining efficient relief." This is a skewed equation favoring defendants, and departs from this Court's past decisions.

The burden of defending in a forum other than defendant's home state is always very heavy because of the "inconvenient location" as well as the imposition of "local rules such as statutes of limitation" (Respondents' Brief, p. 5). Instead of focusing on the minimum contacts necessary to ensure fair play and substantial justice, respondents shift the inquiry to emphasize only the "burden to the defendant." In every forum other than defendants' home state, that burden weighs heavily and can only be overcome, according to respondents, if it is "outweighed" by other nebulous factors.

Although this Court has referred to these factors, *Kulko* v. *Superior Court,* 436 U.S. at 92, it has mentioned them as secondary considerations and has never applied them in the manner proposed by respondents. To the contrary, respondents' approach is baldly designed to favor defendants, and totally fails to account for a defendant's purposeful forum activities and contacts which render it fair and reasonable to require him to defend there, despite the burden of litigating in a distant forum.

Respondent's analysis adds an unnecessary and confusing layer of balancing to the minimum contacts standard. It misconstrues the original statement of the test

to require minimum contacts *plus* a showing of state interest *plus* various other amorphous factors. The original language of *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945), contains no such complex approach.

Injecting into the jurisdictional analysis considerations of a forum's interest, choice of law and substantive and social policies would render chaotic an area which already suffers from imprecision, where "few answers will be written in 'black and white. The greys are dominant and even among them the shades are innumerable' " *Kulko* v. *Superior Court*, 436 U.S. at 92, quoting *Estin* v. *Estin*, 334 U.S. 541, 545 (1948). *See World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. at 297.

Traditionally and logically, such matters as choice of law, forum non conveniens and procedural or substantive law are considered *after* jurisdiction has been established and *after* the court has determined that it has the adjudicative power to pursue these other topics. Enlarging the issue of jurisdiction to embrace a variety of other consideration would unnecessarily encumber the jurisdictional inquiry and render it unworkable. Under respondents' theory, every litigant, at the threshold jurisdictional stage, would resort to identifying and weighing hyopthesized (perhaps contrived) forum interests, as well as a lack of forum interest, in order to sway the jurisdictional balance.

Petitioner has attempted to define a jurisdictional test which derives from this Court's seminal decision in *International Shoe* and which tracks the intent and meaning of this Court's subsequent decisions in *McGee, Shaffer, Kulko, Rush* and *World-Wide Volkswagen*. The formula urged here is based upon normative considerations which can be consistently and rationally assessed. The behavior of a defendant in purposefully availing himself of the benefits and protections of the forum's laws is the key to this analysis. That behavior can be readily determined and objectively evaluated by a court. On the other hand, re-

spondents would impose an unwieldy balancing process that involves numerous subjective factors, including the countervailing considerations of the procedural and substantive law of all states, without any indication of what weight should be given to any of them. Such an approach will eviscerate the minimum contacts formula and render it meaningless.

**II. Proof of substantial reputational interest in the forum is not a prerequisite for jurisdiction over a libel action.**

The existence of a local reputation is not a jurisdictional prerequisite to the commencement of an action for defamation under New Hampshire law, just as an allegation of local reputation is not a necessary element for a libel cause of action, as erroneously urged by the respondents. Jurisdiction is instead based upon the nature and the quality of a defendant's forum-related contacts.

This case presents the classic issue of jurisdiction over a nonresident who commits a tort within the state. *Hess* v. *Pawlowski,* 274 U.S. 352 (1927); *Elkhart Engineering Corp.* v. *Dornier Werke,* 343 F.2d 861, 867 (5th Cir. 1965). Since respondents cannot seriously argue that New Hampshire has no right to entertain a lawsuit between two nonresidents over a cause of action which has arisen there, they instead argue that no cause of action occurred in New Hampshire because Keeton allegedly has no reputation there. But a cause of action in defamation arises wherever the libel is communicated.

Under the original common law rule, every communication of a libelous statement gave rise to a separate cause of action. *Novel* v. *Garrison,* 294 F. Supp. 825, 829 (N.D. Ill. 1969).* The elements of a cause of action for defama-

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* The single publication rule is a doctrine created to avoid a multiplicity of lawsuits for a single defamation. Even though

*(Footnote continued on following page)*

tion are defined in the Restatement (Second) of the Law of Torts §558, and under that definition, an allegation of reputation is not a necessary element for a cause of action in libel.

Official Comment (d) to §558 explicitly states "*Actual harm to reputation not necessary to make communication defamatory,*" and explains that:

> [T]o be defamatory, it is not necessary that the communication actually cause harm to another's reputation or deter third persons from associating with him. Its character depends on its general tendency to have such an effect. In a particular case it may not do so either because the other's reputation is so hopelessly bad or so unassailable that no words can affect it harmfully or because of lack of creditability of the defamer.

Since neither the allegation of injury to reputation* nor the presence of a reputation is an essential element of a cause of action sounding in defamation, a plaintiff has a cause of action in every jurisdiction in which a defamatory statement is communicated. Thus, it is often said that "the place of the wrong is [the place] where the defamatory statement is communicated." *Buckley* v. *New York Post,* 373 F.2d 175, 178 (2d Cir. 1967). See *Haskell*

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*(Footnote continued from preceding page)*

several forums may simultaneously acquire jurisdiction, it requires the plaintiff to recover all of his damages in a single action. But it has nothing to do with ascertaining jurisdiction. See *Buckley* v. *New York Post Corp.,* 373 F2d 175, 179-80 (2d Cir. 1967); *Anselmi* v. *Denver Post, Inc.,* 552 F.2d 316, 319 (10th cir.) *cert. denied sub nom. Times Mirror Co.* v. *Anselmi,* 432 U.S. 911 (1977).

* Most jurisdictions prohibit a libel plaintiff from introducing evidence concerning his reputation as part of his case in chief. *See* L. ELDREDGE, THE LAW OF DEFAMATION, §97 at 564 (1978).

v. *Bailey*, 63 F.2d 873, 875 (4th Cir. 1894) ("It is not the place where the libelous article is printed, but the place where it is published and circulated that makes the words used actionable").

In *Christopher* v. *American News Co.*, 171 F.2d 275 (7th Cir. 1948), an Ohio citizen brought a libel action in the Illinois district court against a New York corporation licensed and doing business in Illinois. The media defendant argued that: "[t]he action was local and could not be brought anywhere except in Indiana, the domiciliary state of plaintiff." *Id.* at 277. The Seventh Circuit reversed the dismissal of the complaint, explaining:

> Authority is uniform on the proposition that libel is not a local but a transitory action. The plaintiff's fame or anonymity in the state of the forum is material only on the determination of damages or at best as an aid in ascertaining the effect of libelous words on the mind of an ordinary reader.

*Id.* (citations omitted).

The special kind of harm inflicted by defamation is not confined to a forum where plaintiff is well known. This dubious concept is a legal fiction that has arisen primarily in the area of choice of law analysis. Restatement (Second) of Conflict of Laws §150 (1971). The victim of a libel may suffer an adverse impact upon his reputation even in a state in which he has hitherto been anonymous. The communication of the libel by itself creates a negative reputation among the residents of the jurisdiction. If Kathy Keeton, for example, had never set foot in New Hampshire, but intended to purchase a summer home there after the libel was circulated, she might very well encounter difficulties due to the bad reputation created by the defamatory statements in Hustler magazine.* In-

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* One purpose of libel law is to provide redress for these "subtle harms", even for "a lady who lives in Paris, and who

*(Footnote continued on following page)*

deed, the First Circuit expressly recognized New Hampshire's interest to "prevent injuries to the *reputations of outsiders* from occurring within the state because *outsiders may someday be hurt if they turn up in New Hampshire* or because there may be spillover effect on their reputations elsewhere." *Keeton* v. *Hustler Magazine, Inc.*, 682 F.2d 33, 34 (1st Cir. 1982) (emphasis added).

The devastating impact of libel has been described as a form of "psychic mayhem" and compared to "physical mutilation". TRIBE, AMERICAN CONSTITUTIONAL LAW, at 648-49 (1st ed. 1978). The kind of scurrilous attack upon Kathy Keeton intentionally committed by respondents strikes at her dignity, inflicts traumatic emotional injury and assaults her self-image. *Rosenblatt* v. *Baer*, 383 U.S. 75, 92 (1966) (Stewart, J. concurring) (the law of libel "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty"). The fear that persons who never even knew Kathy Keeton now believe that she has a venereal disease (8a), displays her body in obscene poses as a "Fifty-Year-Old Centerfold" (15a-32a) utters profanities and is sexually promiscuous (19a) is equally as upsetting to her as knowing that this libel has been read by her family, friends and business associates. As Professor Eldredge has written:

> One who believes that he appears to be ridiculous in the eyes of his fellowmen can suffer an agony of emotional distress which may be more painful, and for more lasting than the pain from the severed nerves of a torn-off arm.

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*(Footnote continued from preceding page)*

has not lost, so far as we know, a single friend and who has not been able to show that her reputation has in any way suffered from the publication of this unfortunate picture play. . . ." L. ELDREDGE, THE LAW OF DEFAMATION, §4, at 9-10 (1978), quoting the English case of *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures, Ltd.*, 50 T.L.R. 581 (C.A. 1934).

L. ELDREDGE, LAW OF DEFAMATION, §4 at 11 (1978). Thus, the "psychic mayhem" intentionally inflicted upon Kathy Keeton by the unique tort of libel does not depend upon the extent to which people know her, but rather upon the extent to which the publication was disseminated.

**III. Personal jurisdiction is measured only by the due process clause: other constitutional considerations are inapplicable to the minimum contacts test.**

The due process clause of the fourteenth amendment is the only restraint imposed by the Constitution upon the exercise of personal jurisdiction. Other constitutional provisions, such as the first amendment and the commerce clause, raised now for the first time by the respondents, do not affect the exercise of personal jurisdiction.

This Court has explained how the limitation on state adjudicative power is a by-product of the due process clause, which is the only constitutional provision that imposes a restriction on personal jurisdiction:

> The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. *That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.*

*Insurance Corp.* v. *Compagnie des Bauxites*, 456 U.S. 694, 702 n.10 (1982) (emphasis added).

Although they do not function to limit jurisdiction, considerations relating to interstate commerce and freedom of speech and press are accomodated by the doctrine of forum non conveniens. This Court has recognized that a court may decline to exercise its adjudicative power under the doctrine of forum non conveniens. *Piper Aircraft Co.* v.

*Reyno*, 454 U.S. 235 (1981). But a district court has no power to dismiss an action on that ground if the transfer provisions of 28 U.S.C.A. §1404(a) are applicable. *Collins* v. *American Auto Ins. Co.*, 230 F.2d 416 (2d Cir.), *cert. dism'd per stipulation*, 352 U.S. 802 (1956); *Vanity Fair Mills* v. *T. Eaton Co.*, 234 F.2d 633, 645 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956); *Headrick* v. *Atchinson, T.&S.F. R.R. Co.*, 182 F.2d 305, 308-09 (10th Cir 1950).

*Cf. Moses H. Cone Hospital* v. *Mercury Construction Co.*, 51 U.S.L.W. 4156, 4159 (1983) (the "federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'")

This is especially compelling when the only real prejudice the defendant alleges it will suffer is the possibility that the transferee forum may apply an unfavorable statute of limitations. *Cf. Kloeckner Reederei und Kohlenhandel* v. *A/S Hakedal*, 210 F.2d 754, 757 (2d Cir.) *cert. dism'd per stipulation*, 348 U.S. 801 (1954) ("defendant not entitled to dismissal on grounds of forum non conveniens solely because the law of the original forum is less favorable to him than the law of the alternative forum").

The decision to dismiss this action on the basis that another jurisdiction might apply an unfavorable law, moreover, raises the practical problem of "reverse forum shopping" by the defendant. This Court explained the danger in *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 433 n.19 (1981): "[i]n holding that the possibility of a change in law unfavorable to the plaintiff should not be given substantial weight, we also necessarily hold that the possibility of a change in law favorable to the defendant should not be considered . . . ."

Finally, the application of the doctrine of forum non conveniens is inappropriate here because there is no alternate forum where petitioner can litigate her claim, having diligently acted to protect her rights and promptly

placing respondents on notice of her claims.* *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 506-07 (1947). *See Piper Aircraft Co.* v. *Reyno*, 454 U.S. at 255 n.22.

**A. The commerce clause does not limit the Court's power over the person of the defendant.**

Respondents improperly rely on the line of cases represented by *Davis* v. *Farmers Cooperative Co.*, 262 U.S. 312 (1923), for the proposition that the commerce clause acts to deprive a court of jurisdiction that would otherwise exist. This line of Supreme Court cases which culminated in *B & O R.R.* v. *Kepner*, 314 U.S. 44 (1941), was rendered obsolete by the passage in 1948 of 28 U.S. C.A. §1404a) (West 1976).** Upholding jurisdiction over a non-resident railroad in *Scanapico* v. *Richmond, F. & P. R.R.*, 439 F.2d 17, 28-29 (2d Cir. 1970), Judge Hays explained:

> The majority has resurrected a whole battery of cases dating from thirty-five to fifty years ago in order to materialize the ghost of a long-outmoded view of 'burden on interstate commerce. As the majority opinion of the panel said:

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* Shortly after the Ohio litigation was commenced, defendants moved for dismissal of the claims relating to the defamatory cartoon on the ground of the statute of limitations. Applying Ohio law, on May 15, 1978, the trial court dismissed the libel count but did not dismiss the privacy count, holding that the Ohio four-year statute of limitations applied. This Court may take judicial notice of that decision. 10 MOORE'S FEDERAL PRACTICE, §2.01.02 [1] (1982). Accordingly, Keeton believed that her claim was preserved, until the trial court subsequently reversed itself by a decision dated February 19, 1980 (the very day the trial was to commence), and dismissed Keeton's privacy claim by applying New York's one-year statute of limitations.

** This statute was enacted to avoid the extreme remedy of dismissal as the only alternative to forcing the defendant to litigate in an inconvenient forum.

> "The cases which appellant cites hark back to earlier days and reflect a far less fully developed state of our national economy. In McGee v. International Life Insurance Co., [355 U.S. 220, 78 S.Ct. 199, 2 L.Ed2d 223 (1957)] the Court said at p. 223:
>
> > 'modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.'

In a footnote, Judge Hays indicated that transfer rather than dismissal was the alternative manner of handling the case. *Id.* at 29. Disregarding the "ghost" of the *Davis* line of cases, Judge Hays concluded that jurisdiction under such circumstances could be properly asserted "whether or not plaintiff is a resident." *Id.* at 29.

The Sixth Circuit in *Southern Machine Co.* v. *Mohasco Indus.*, 401 F.2d 374, 378 n.6 (6th Cir. 1968), explicitly recognized that the commerce clause considerations raised by the *Davis* line of cases are no more than a specific application of the familiar doctrine of forum non conveniens.

Similarly, in *Buckley* v. *New York Post Co.*, 373 F.2d 175, 184 and n.9 (2d Cir. 1967), Judge Friendly stated that the issue confronting the Court in the *Davis* line of cases involved the doctrine of forum non conveniens and not the minimum contacts requirements of the due process clause.

In any event, the *Davis* line of cases involved objections to claims that did not relate to the defendant's forum activities, a situation far different from this case. Moreover, this Court in *Miles* v. *Illinois Central R.R. Co.*, 315 U.S 698, 702 n.3 (1941), limited the principles of those cases "to the rule that suits upon extra-state causes of action under F.E.L.A. burden commerce and will not be permitted in courts of states where defendant carriers do no more than maintain facilities for solicitation of business." *See also B & O R.R. Co.* v. *Kepner*, 314 U.S. at 55 n.11.

**B. First Amendment considerations do not inhibit the exercise of jurisdiction over the person of defendant.**

Since the evolution of the doctrine of *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), the media has achieved a notable array of substantive defenses. This Court has recently questioned the need for and the fairness of the trend to expand the media's procedural rights under the guise of first amendment considerations. *Hutchinson* v. *Proxmire*, 443 U.S. 111, 120 n.9 (1979) (summary judgment); *Herbert* v. *Lando*, 441 U.S. 153 (1979) (inquiry into editorial processes). The doctrine of *New York Times* v. *Connor*, 365 F.2d 567 (5th Cir. 1966), relied upon by respondents for their first amendment argument, is a concept whose time has come and gone.*

Even the Fifth Circuit, which decided *Connor*, has since strictly limited its applicability. *Compare New York Times Co.* v. *Connor, with Curtis Publishing Co.* v. *Golino*, 383 F.2d 586 (5th Cir. 1967). In *Edwards* v. *Associated Press*, 512 F.2d 258, 266 (5th Cir. 1975), the Fifth Circuit devalued the precedential value of the *Connor* principle by describing it as a mere "cautionary note." A unanimous Tenth Circuit panel later indicated that the *Connor* rule was no longer even the law of the Fifth Circuit. *Anselmi* v. *Denver Post, Inc.*, 552 F.2d 316, 324 (10th Cir. 1977), *cert. denied sub nom. Times Mirror Co.* v. *Anselmi*, 432 U.S. 911 (1977). Referring to the Fifth Circuit's decisions in *Connor* and *Buckley* v. *New York Times Co.*, 338 F.2d 470 (5th Cir. 1964), Judge Friendly observed that:

> We are not sure whether the law made by these hard cases was good or bad. Newspapers, magazines, and broadcasting companies are businesses con-

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* The Second Circuit in *Buckley* v. *New York Post Co.*, 373 F.2d 175, 182 (2d Cir. 1967), declined to follow the Fifth Circuit in *New York Times* v. *Connor*, 365 F.2d 567 (5th Cir. 1966), stating that the: "[h]azards to publishers in libel actions have recently been much mitigated by the development of substantive principles under the First Amendment."

> ducted for profit and often made very large ones. Like other enterprises that inflict damage in the course of performing a service highly useful to the public, such as providers of food or shelter or manufacturers of drugs designed to ease or prolong life, they must pay the freight.

*Buckley* v. *New York Post Corp.*, 373 F.2d 175, 182 (2d Cir. 1967).

Judge Friendly was of the view that any considerat on of first amendment principles is more appropriately made in the context of forum non conveniens rather than jurisdiction. *Id.* at 183-84. Significantly, no other circuit has adopted the rule, and most courts and commentators who have considered the doctrine have criticized it.

## CONCLUSION

**The judgment of the court below should be reversed and the action reinstated.**

Respectfully submitted,

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